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No. 94-138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD MILONE,

Petitioner,

v.

ALTHEA CAMP, Warden,
Graham Correctional Center, Illinois
Department of Corrections,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Does a free-standing claim of actual innocence entitle a non-capital state prisoner to federal habeas corpus relief?

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PRAYER

The State of Illinois asks this Court to deny the Petition for a Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit, entered April 21, 1994, insofar as petitioner does not raise an issue worthy of review.

OPINION BELOW

The opinion below is cited as *Milone v. Camp*, 22 F.3d 693 (7th Cir. 1994). A copy of the opinion is included in petitioner's appendix.

STATEMENT OF THE CASE

Petitioner, Richard Milone, seeks review of a judgment affirming the denial of a petition for a writ of habeas corpus that held that petitioner's conviction and sentence were constitutionally imposed.

Procedural Background

In 1973, petitioner was tried and convicted in the Circuit Court of DuPage County, Illinois, for the murder of fourteen-year-old Sally Kandel. His conviction was affirmed on direct appeal. *People v. Milone*, 43 Ill. App. 3d 385, 356 N.E.2d 1350 (2d Dist. 1976). The Illinois Supreme Court denied leave to appeal, and no petition for a writ of certiorari to this Court was sought.

In 1986, petitioner filed his first petition for a writ of habeas corpus. The district court initially granted the State's motion to dismiss, reasoning that petitioner was required to first exhaust his state remedies. *United States ex rel. Milone v. Camp*, 643 F.Supp. 679 (N.D. Ill. 1986).

Petitioner then filed an amended petition raising only the issues he had previously presented to the Illinois appellate court. (App. at 5) The federal proceedings were then stayed while petitioner pursued executive clemency, which was denied. *Id.* Petitioner was then allowed to present all of his original habeas claims, both exhausted and unexhausted, under the theory that petitioner "had made a good case for relaxation of the total exhaustion rule." *Id.* In 1992, the district court dismissed the petition.

On appeal to the United States Court of Appeals for the Seventh Circuit, petitioner's arguments "center[ed] around the claim that he [was] actually innocent of the crime of which he was convicted." (App. 6) Relying on this Court's holding in *Herrera v. Collins*, ____ U.S. ____, 113 S.Ct.

853, 862 (1993), the Seventh Circuit noted that "actual innocence" was not a cognizable habeas claim in and of itself. Rather, it provides " 'a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.' " (App. 7, quoting *Herrera*.) Next, the Court of Appeals noted that although under its reading of this Court's precedent, it would be contrary to the Constitution to execute a legally and factually innocent person, such an extension of the concept of "actual innocence" was not applicable to this petitioner, who had not received the death penalty and was in fact released on parole. (App. 7-8) Consequently, the court below examined the actual innocence claim solely in terms of whether it could excuse petitioner's failure to exhaust his state remedies before pursuing habeas relief. (App. 8) The court noted that the parties disagreed as to the threshold standard required to demonstrate actual innocence, and then refused to determine whether in fact petitioner met either standard, deciding instead that it was more efficient to review petitioner's constitutional claims, which it deemed without merit, than to engage in a long analysis of his factual claims under either standard propounded by the parties. (App. 10) The court below held:

> The remainder of this opinion is premised on the assumption that Milone has made a sufficient showing of actual innocence to warrant habeas review of all of his constitutional claims, unexhausted as well as exhausted.

(App. 10).

The court below then proceeded to examine petitioner's five constitutional claims, including a challenge to the sufficiency of the evidence. (App. 11) The court refused, however, to consider additional claims connected to his "ac-

tual innocence" argument. (App. 11-12) As to the sufficiency of the evidence claim, when examining the record evidence, the court below found that under *Jackson v. Virginia*, 443 U.S. 307 (1979), the evidence presented at trial was sufficient to support his conviction. (App. 14) Similarly, the court rejected the petitioner's other claims and in concluding, stated:

> [W]e are unable to accept Milone's invitation to engage in a broad inquiry into his guilt or innocence. Our interpretation of applicable Supreme Court precedent and of the policies underlying habeas review precludes such a proceeding. First, *Herrera* strongly suggests that actual innocence is not itself a ground for granting habeas relief in anything other than a capital case, 113 S.Ct. at 860, thus implicitly overruling federal cases suggesting otherwise. In addition, a contrary rule would gravely undermine legitimate concerns for federalism and finality by arrogating to federal courts, under the guise of a constitutional claim to substantive due process, the fact-finding function that is generally reserved for state processes.

(App. 19).

This petition followed.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S FREE-STANDING CLAIM OF ACTUAL INNOCENCE DOES NOT ENTITLE HIM TO FEDERAL HABEAS RELIEF, AND CONSEQUENTLY PROVIDES NO GROUND TO ISSUE A WRIT OF CERTIORARI.

Petitioner first contends that the writ of certiorari is justified in order "to decide whether or not a 'free standing' claim of actual innocence provides a basis for federal habeas review." (Petition at 10-14) Just last term, this Court answered that question in the negative in *Herrera v. Collins*, ____ U.S. ____, ____, 113 S.Ct. 853, 862 (1993). That case makes clear that a claim of "actual innocence" is not itself a constitutional claim, "but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* In fact, the Court held:

> The fundamental miscarriage of justice exception is available only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence. We have never held that it extends to free-standing claims of actual innocence.

Id. at ____, 113 S.Ct. at 862-63. (internal quotation marks, citation and emphasis omitted) Moreover, although in that case the Court assumed in the alternative that in a capital case a truly persuasive demonstration of "actual innocence" occurring after trial would render the execution of a defendant unconstitutional, thus justifying federal habeas relief, *id.* at ____, 113 S.Ct. at 869, this non-capital petitioner, already serving the remainder of his sentence on parole, may not avail himself of that language to justify certiorari.

The Seventh Circuit's opinion recognizes and adheres to both aspects of this Court's "actual innocence" jurispru-

dence: First, that the concept is not an independent ground for federal habeas relief, but instead functions only as a means for a petitioner to present defaulted, successive or abusive claims in a federal forum. *Cf. Sawyer v. Whitley*, ___ U.S. ___, 112 S.Ct. 2514 (1992). Second, even if "actual innocence" could stand alone as a self-supporting justification for the writ of habeas corpus, it would assume such a status only in the context of a capital case where the defendant was bereft of a state avenue open to process such a claim. *Herrera, supra.*[1]

Other aspects of the decision below militate against granting the writ of certiorari. First, the court declined to resolve whether in fact petitioner convincingly demonstrated his actual innocence so as to warrant habeas review of his unexhausted claims. (App. 10) Instead, the Court of Appeals disposed of the claims on the merits, finding it "more efficient" to reach the claim than engage in a "long analysis" of the factual claims under either the *Kuhlmann* or *Sawyer* standards. *Id.* The court below then held:

> The remainder of this opinion is premised on the assumption that Milone has made a sufficient showing of actual innocence to warrant habeas review of all of his constitutional claims, unexhausted as well as exhausted.

The opinion below is in perfect accord with the letter and spirit of this Court's habeas jurisprudence, which has

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[1] The most recent case considered by the Court also involves a capital case. *Schlup v. Delo*, 93-7901. Moreover, that case involves the question of which standard must be met by a habeas petitioner attempting to demonstrate his or her actual innocence: the "colorable claim" noted in *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986), or the "clear and convincing" standard contained in *Sawyer v. Whitley*, ___ U.S. ___, 112 S.Ct. 2514, 2517 (1992).

reaffirmed the importance of the guilt or innocence determination in state criminal trials. *Herrera*, ____ U.S. at ____, 113 S.Ct. at 861, citing *Barefoot v. Estelle*, 463 U.S. 880 (1983) and *Wainwright v. Sykes*, 433 U.S. 72 (1977). That determination, at the state level, is a "decisive and portentous event." *Id.* Indeed, the trial is "the paramount event for determining the guilt or innocence of the defendant." *Id.* at 869. This Court also recognized in *Herrera* that "[f]ew rulings would be more disruptive of our federal systen than to provide for federal habeas review of free-standing claims of actual innocence." *Id.* at 861.

The Court below issued an opinion that respects the primacy of the state system in the guilt phase of a state criminal trial, and petitioner makes no convincing argument that would justify the abandonment of the doctrines of comity and finality that have for so long guided and shaped this Court's habeas caselaw. Moreover, since the court below did not reach the question of which standard was appropriate to determine whether petitioner had made the requisite showing of actual innocence, (App. 10), the issue of whether an evidentiary hearing is required in order to aid that determination is not properly before the Court. (Pet. 15) Alternatively, if petitioner is asserting a right to an evidentiary hearing as a means of demonstrating his free-standing claim of actual innocence, his inability to maintain such a claim on habeas renders the question moot. Moreover, Illinois' time limitation on the ability to present newly discovered evidence does not, contrary to petitioner's contention (Pet. at 15), alter the scenario. This Court implicitly approved an identical time frame in *Herrera*, where it noted that Texas, like Illinois, requires a new trial motion based on newly discovered evidence to be made within 30 days of judgment. *Herrera*, ____ U.S. at ____, 113 S.Ct. at 865, n. 8. Such a requirement was deemed not to transgress rooted principles of

fundamental fairness. *Id.* at 866. That being the case, petitioner has no right to an evidentiary hearing on habeas in order to present his dilatory and defaulted claims.

Petitioner's conviction and sentence were imposed and reviewed in a manner consistent with the precepts of the Constitution. There is no reason for this Court to intervene.

CONCLUSION

WHEREFORE, Respondent asks this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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